

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 244 of 1981

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

-----

SHAH GAGALDAS PUNAMCHAND

Versus

MUMAN RASUL GANI

-----

Appearance:

MR AVINASH K MANKAD for Petitioner

MR KG VAKHARIA for Respondent No. 1, 2

-----

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 10/10/2000

ORAL JUDGEMENT

This appeal has been preferred by the plaintiff in Civil Suit No. 304 of 1977. The plaintiff is a money lender and had on 24th November, 1974 lent a sum of Rs. 1,731/= to one-Muman Habibbhai Karimad of village Bavalchudi on interest at the rate of 15 per cent per

annum. The said Muman Habibbhai had executed a promissory note for payment of the sum of Rs. 1731/= with interest @ 15/% p.a. Before the said loan amount was repaid, the borrower Muman Habibbhai died on 17th May, 1976. Upon his death, his estate devolved on one Mariyambai, the widow of Nura Karimad, the brother of the deceased Muman Habibbhai. The estate of the deceased Muman Habibbhai consist of (a) House no. 65 at village Bavalchudi; (b) the open plot of land bearing no. 12; and (c) an agricultural land admeasuring 7 acres and 28 gunthas, bearing Survey No. 517, situated in the sim of village Bavalchudi. The said Mariyambai on 22nd November, 1976 sold the agricultural land to one Muman Rasul Gani and on 12th August, 1976, gave away the House No. 65 and the open piece of land bearing No. 12 to one Bai Chhabiha Ahmed [then a minor] by gift. Both the transfers were made by the registered documents. Accordingly, the mutation entries were also made in the Revenue records. The plaintiff served a notice to the above referred Muman Rasul Gani, the defendant no. 1 and Bai Chhabiha Ahmed, the defendant no. 2 and demanded the loan amount and interest thereon which the deceased Muman Habibbhai owed to the plaintiff from the estate of the said deceased Muman Habibbhai. However, both the defendants denied the liability to pay the said amount. Feeling aggrieved, the plaintiff instituted above Civil Suit No. 304 of 1977 for recovery of sum of Rs. 2500/= and the interest @ 15% p.a. It was alleged that the plaintiff had a right to recover the loan amount and the interest thereon from the estate of the deceased Muman Habibbhai and that the late Mariyambai had transferred the said estate to the defendants nos. 1 & 2 fraudulently with a view to defraud the plaintiff. The suit was duly contested. The defendants filed their written statement at Exh. 20. The allegations were denied. The defendants maintained that they had become lawful owners of the properties transferred to them respectively.

The learned trial Judge under his judgment and order dated 22nd December, 1978 held that the plaintiff did lend a sum of Rs. 1731/= to the deceased Muman Habibbhai on 23rd November, 1974; as alleged, and that the deceased Muman Habibbhai had executed a Promissory Note for the loan amount and the interest thereon. He also held that the said Muman Habibbhai did not discharge his debt during his life time, however, the learned Judge was of the opinion that the defendants were not liable to discharge the debt of the deceased Muman Habibbhai. The suit was accordingly dismissed. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 4 of 1979,

which too was dismissed on 6th January, 1981. Feeling aggrieved, the plaintiff has preferred the present appeal.

The following question of law has been framed by this Court :-

`Whether an heir of deceased Mahomedan can make a valid gift of her share in the property of the deceased before the debts of the deceased are paid off.'

The facts undisputed are :- That the property in question belonged to the deceased Muman Habibbhai; that on death of the said Muman Habibbhai, the property devolved on Mariyambai; that Mariyambai sold part of the estate to the defendant no. 1 and gave away the part of the estate in gift to defendant no. 2. The said Mariyambai died soon thereafter ie., in the month of December, 1978. The statutory provisions in respect of succession and administration of the estate of deceased Mahomedan are encoded in Chapter-V of the Mohamedan Law. Section 39 thereof reads as under :-

`39. Administration of the estate of a deceased Mohamedan - The estate of a deceased Mohamedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) other debts of the deceased according to their respective priorities (if any); and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death, and the heirs has a right of contribution against his co-heirs, if by the action of the judgment creditor under a decree under sec. 52 of the Civil Procedure Code against all the heirs, he was left with less than his proper share of the net estate of the deceased. Under Mahomedan law, the payment of the debts of the deceased takes precedence over

the legacies.'

Section 40 provides for vesting of estate in executor and administrator. Section 41 provides for devolution of inheritance. It provides, inter alia, that the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will, devolves on his heirs at the moment of his death, and devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares. Section 42 provides, inter alia, that any heir may even before distribution of the estate, transfer his own share and pass a good title to a bona fide transferee for value, notwithstanding any debts that might be due from the deceased. Section 43 provides that each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate. Section 44 provides, inter alia, that since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts. Section 45 provides that if the estate is represented by an executor or administrator, a suit by a creditor of the deceased should be instituted against the executor or administrator, as the case may be. Section 46 provides for a suit by creditor against heirs of the deceased where the estate of the deceased has not been distributed between the heirs, he is not entitled to execute the decree against the property as a whole without regard to the extent of the liability of the heirs inter se.

As recorded hereinabove, the plaintiff had not obtained a decree for the loan amount and the interest thereon before the death of the deceased Muman Habibbhai or even before the death of his heir Mariyambai. On the death of Muman Habibbhai, his estate devolved on Mariyambai. Such devolution could not have been suspended on account of undischarged debts. The said Mariyambai during her life time made valid transfers and part of the estate was transferred in favour of defendant no. 1 by a registered sale deed and in favour of defendant no. 2 by a gift deed. The plaintiff has failed to prove that the aforesaid transfers were made with a view to defeating the claim of the plaintiff. Upon such transfers, the defendants nos. 1 & 2 became the full owner of the part of the estate transferred to them respectively. In absence of any decree against the estate of the deceased, the plaintiff could not have a

valid claim for discharge of the debt of the deceased Muman Habibbhai as against the transferees-the defendants.

In view of the above discussion, the appeal is dismissed with costs.

\*\*\*\*

Prakash\*